Supreme Court of The United States

OCTOBER TERM, 1953

No. 423

LLOYD M. BENTSEN, SR., *et al.*,
Petitioners,

EMERY C. BLACKWELL, *et al.*,
Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the respondents, Emery C. Blackwell, Boyd Construction Company, Claude E. Blackwell, Clyde W. Weatherly, Arie K. Smith, Dudley Smith, W. H. Ham, Herbert Clark and Frank L. Danner, and respectfully present their brief in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The trial court sustained petitioners motion to dismiss for lack of jurisdiction on two points. First, that respondents failed to plead the sale of an "investment contract" as defined by the Securities Act of 1933; and Second, that no use of the mails was made sufficient to constitute a violation of Sec. 12(2) of the Act, 15 U.S.C.A. 771(2).

On appeal, the Fifth Circuit reversed and remanded on both points. No evidence has been received, and both the appeal and the petition for certiorari are based solely on the pleadings.

the United States Mails) and increasing the size of their investments. All of these facts will be fully developed on the trial of this case. We do not believe that this Court should be required to decide a question of the importance involved, without having a full development of the facts.

It is true that some of these facts are alleged in a general manner, but the petitioners are fully on notice of what they will need to meet on the trial, and we say that this manner of pleading is contemplated by the Federal Rules of Civil Procedure. In any event, a full presentation of the facts involved will result in the point being decided fairly to all concerned.

2. Petitioners stress in their argument that the present case is local in nature. While it is true that the respondents all reside within the State of Texas, the local nature of this transaction does not involve next door neighbors as petitioners would have this Court believe. Four of the purchasers live approximately 900 miles from their investment, two of them approximately 600 miles, one was an engineer from Wisconsin who moved to Texas after the purchase, with the nearest purchaser residing at least 400 miles from the scene of this operation.[2]

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[2] Judge Allred referred (R. 57) to five similar cases filed against the same principal Defendants and stated that they were grounded on practically the same allegations of conspiracy and fraud. In fact, the cases did not involve the Securities Act of 1933, but were based on the common law and statute of the State of Texas. It is worthy of note as to the extensive nature of the operations of the principal defendants that the 5 plaintiffs in the five consolidated cases were from 5 different states, California, Iowa, Ohio, Indiana and Minnesota.

Alarm is expressed by petitioners, that if the decision below is allowed to stand that the overworked Federal District Courts will be flooded by local land fraud suits. We agree that all of our District Judges are greatly overworked and evidence of this is the fact that the present suit was filed in June, 1951 and the memorandum opinion of the trial court was not filed until April of 1952, some 10 months later. However, there is no basis for the argument that the Federal Courts will be flooded by local land fraud suits. The decision of this Court in S.E.C. v. W. J. Howey Company, 328 U. S. 293, has been on the books seven years, and the decision in Schillner v. H. Vaughan Clarke & Co., 134 F. 2d 875 (C. A. 2, 1943) for 10 years, and the predicted flood of suits has not as yet developed. It is equally open to speculation that the correct decision stopped the fraudulent operators rather than started a flood of litagation.

3. Petitioners point out that the purpose of the Securities Act was to remedy the ineffective relief available to purchasers of securities who were being fleeced by unscrupulous operators. Congress, in the Securities Act of 1933 enacted a very comprehensive statute providing for both civil and criminal liability. The section involved here covers civil liability and is section 12 (2). The comparable section involving criminal liability is 17 (a). The court rulings involving the jurisdictional language under 17 (a) have not required that the misrepresentations

or half-truths be transmitted through the mails.[3]

Therefore, if sec. 12 (2) is restricted to the narrow view of Kemper v. Lohnes 173 F (2) 44, then it is possible that a sale might be in violation of the criminal section and yet the purchaser would have no civil remedy under sec. 12 (2). Sec. 12 (2) is unquestionably a remedial provision and, as such, is entitled to liberal construction. This was recognized by the Court in Schillner v. H. Vaughan Clarke & Co., 134 F. (2) 875 at 877:

"We do not think that this is the inevitable, or even the most natural, meaning of the statutory language. Liability to repay the consideration received is imposed upon any person who 'sells a security ***** by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication' of the untrue or misleading character described in the section. To accept appellant's construction would render the phrase 'oral communication' of most limited application because the section would then reach only interstate telephone calls or conversations where the parties might

[3] The following are examples of mailings which have been held sufficient:

Mailings by Defendants' Agents to the Defendants containing reports of the success of meetings held to obtain money from victims, and remitting cash statements and bank drafts, U. S. vs. Monjar, 47 Federal Supplement 421 Aff'd, 147 Federal 2nd, (C. A. 3, 1944) cert.

Delivery by Mail of a stock certificate after the contract of Sale was concluded orally and the stock paid for. S.E.C. vs. Wimer 75 Federal Supplement 955.

Mailings of Warranty Deeds between Defendants, and to the County Clerk for recording and subsequent delivery to the investors. Mansfield vs. U. S. 155 Federal 2nd 952 (C. A. 5, 1946) cert. denied, 329 U. S. 792, 1946.

be talking across a state line. It would seem much more likely that Congress intended to make the statute applicable if one sells a security by use of the mails, even though the seller's untrue or misleading statement is communicated orally and intrastate."

We have alleged, and will show on the trial that the plan and scheme involved in the sale of the citrus groves and management contracts, was dependent on the use of the United States Mails, and that without the facilities provided by the mails, none of the sales could have been completed. The management contracts were completed and delivered to the purchasers through the mails after they returned to their homes in distant parts of Texas. The Management Contracts are an integral part of the investment, and the sales were not completed in face to face negotiations as stated by petitioners.[4] The instant transactions are the type transactions at which Congress was aiming, and the opinion of the Circuit Court below is in keeping with the intention of Congress.

For the above reasons, the Petition should be denied.

Respectfully submitted,

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[4] Petitioners further argue that the Federal Court should not take jurisdiction of this case because the local courts are fully able to grant relief, and that Sec. 22 (a) prohibits removal of such actions to the Federal Courts. We respectfully submit that unless there has been a use of the mails sufficient to constitute a violation of Sec. 12 (2), the local courts would have no more jurisdiction than the Federal Courts.

IN THE

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION

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1. The SEC in its memorandum has clearly conceded both the conflict between the Circuits in the present case and the importance of this question.

2. Respondents likewise have conceded that "the point involved in this suit is of great importance . . ." (Opposition Memo, p. 3).

3. The only point made by respondents in opposition is that the question presented is of such importance that it should not be decided on the pleadings but only after trial. But no trial is necessary, the issue of law being clearly presented on the face of the complaint. That issue is whether a civil action under the Securities Act of 1933 may

be brought where a sale is completed without use of the mails or interstate commerce, but the securities are delivered by mail after the sale. The Securities and Exchange Commission made no suggestion that additional evidence would be necessary to clarify the question. Nor did the Court of Appeals. The issue is the same admittedly decided to the contrary by the Seventh Circuit in *Kemper* v. *Lohnes*, 173 F. 2d 44. (Opposition Memo, p. 6.)

4. The argument that certain facts developed on deposition might alter the Court's conclusion is without foundation. Those facts appear from the complaint itself.[1]

5. The fact that the mails were used to collect subsequent payments for care of the trees also appears in the complaint. The court below apparently regarded it as too remote in time to have any connection with the sale of the alleged investment contract. But if these mailings have any relevance they are fully alleged in the complaint and can be availed of in this Court. No testimony is necessary to determine the legal question.

6. Since the legal issue is clear from the complaint and no testimony whatsoever is necessary to clarify it, it is an unconscionable suggestion that the District Court should be required to go through an extensive trial. The trial would be devoted primarily to the question of fact concerning whether certain representations were made and whether they were true or false. Such a trial would be unnecessary

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[1] For example, the fact that dates inserted in management contracts were subsequent to the dates of the deeds to the property appears clearly in the complaint. This, of course, resulted from the circumstance that care for the trees was not needed until the trees were planted. The facts are that all the arrangements for the sale of the property, for the planting of the trees and for their care were made in face-to-face conversations in the State of Texas and that mere mechanical and ministerial acts took place thereafter, such as the recording of the deeds, the filing in of the blanks in the management contracts, and the mailing of both documents to the purchasers. This, both the District Court and the Court of Appeals understood in arriving at their respective conclusions.

if this Court should rule that as a matter of law no jurisdiction exists in the federal court.

7. The issue is clear now. It is ripe for decision and the decision is concededly important. Delay is unnecessary and would result in lengthy and expensive litigation which might otherwise be avoided.

8. As to the merits, we have set forth in our petition the reasons why the Congress did not intend to exercise the full limit of its constitutional power. Both respondent and the SEC urge that it is inconceivable that the civil remedy provisions should be placed on a more limited jurisdictional base than the criminal provisions of the Act. But there is good reason for such a difference. Criminal provisions are applied only when government officials, the SEC, and the Attorney General decide that recourse to the federal courts is appropriate in the public interest. In such cases broadening the area of such discretion cannot be expected to flood the federal courts with purely local matters. On the other hand, a civil action may be commenced by anybody who feels himself aggrieved. For example, the ordinary bond and mortgage, like the ordinary promissory note, is a security under the Securities Act, Section 2(1), 15 USC § 77b(1). Bonds and mortgages are normally recorded and thereafter delivered by mail. Under the decision below, private individuals who might prefer the federal courts could bring disputes involving real estate mortgages into the federal courts under the Securities Act. Surely no such intention should be attributed to the Congress when the language it used plainly indicates the contrary.

CONCLUSION

On the basis of all the memoranda, it is clear that the issue is important; that it involves conflict between two circuits; that it is ripe for decision now; and that the question presented is substantial. The petition should be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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